Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd

HIGH COURT (JOHOR BAHRU) — COMPANIES WINDING-UP NO 28–111 OF 1997
ABDUL MALIK ISHAK J
6 JUNE 1998

Companies and Corporations *— Winding up — Disputed debt — Test of commercial insolvency applied — Companies Act 1965 s 218(1)(e)*

Companies and Corporations *— Winding up — Notice of demand — Notice sent to respondent's previous registered address — Whether irregularity in statutory notice had caused substantial injustice to respondent — Whether irregularity was curable and could be remedied by court — Companies Act 1965 s 218(2)(a) — Companies (Winding-Up) Rules 1972 r 194(1)*

The respondent — a company incorporated under the Companies Act 1965 ('the Act') — was indebted to the petitioner for RM462,819.50. The respondent failed, neglected and/or wilfully refused to pay to the petitioner the sum notwithstanding numerous demands by the petitioner. A notice of demand under s 218(2)(a) of the Act ('the notice') was duly served on the respondent by leaving a copy of the same at the registered address of the respondent. The petitioner applied that the respondent be wound up by the court. The respondent disputed the debt sum and alleged that the petitioner did not take into account those sums which had already been paid. Counsel further argued that the notice was defective as a change of address of the respondent had prevented the respondent from receiving the notice.

Held; allowing the application:

(1) The debt incurred by the respondent to the tune of RM462,819.50 was not in dispute at all. Inability to pay debts under s 218(1)(e) of the Act is a common ground for a winding-up order. The petitioner as a creditor who is not paid has a right to file a petition for winding-up, whatever the motives may be. The test of commercial insolvency is simple, ie whether the company is unable to meet its current debts as they fall due. A company may have substantial wealth which cannot be realized immediately and if that happens the company is said to be unable to pay its debts within the purview and ambit of s 218(1)(e) of the Act and this is so even though on liquidation the company will be able to meet all its liabilities (see p 814E–G).

(2) The irregularity in the statutory notice did not cause any substantial injustice to the respondent. The real issue of the day would be whether the respondent was able to pay its debts. Further, applying r 194(1) of the Companies (Winding-Up) Rules 1972 to the factual matrix of the present case would mean

that the irregularity in the statutory notice in regard to the registered address of the respondent, though it was not the fault of the petitioner, was curable and could be remedied by this court. There was no material to show that the respondent could pay its debts and for this simple reason the respondent should be wound up (see pp 817E, F and 819B–C); *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* [1990] 2 MLJ 46 followed.

[Bahasa Malaysia summary

Penentang — sebuah syarikat yang diperbadankan di bawah Akta Syarikat 1965 ('Akta tersebut') — telah terhutang dengan pempetisyen sebanyak RM462,819.50. Penentang gagal, cuai dan/atau dengan sengaja enggan membayar kepada pempetisyen walaupun banyak tuntutan telah dibuat oleh pempetisyen. Notis tuntutan di bawah s 218(2)(a) Akta tersebut ('notis tersebut') telah disampaikan ke atas penentang dengan meninggalkan satu salinan notis tersebut di alamat berdaftar penentang. Pempetisyen memohon supaya penentang digulung oleh mahkamah. Penentang mempertikaikan jumlah hutang dan mengatakan pempetisyen tidak mengambil kira jumlah yang telah dibayar. Peguam selanjutnya berhujah bahawa notis tersebut adalah cacat kerana pertukaran alamat penentang telah menghalang penentang daripada menerima notis tersebut.

Diputuskan, membenarkan permohonan:

(1) Hutang yang dialami oleh penentang yang berjumlah sebanyak RM462,819.50 tidak dipertikaikan langsung. Ketidakupayaan untuk membayar hutang di bawah s 218(1)(e) Akta tersebut adalah alasan biasa untuk perintah penggulungan. Pempetisyen sebagai pemiutang yang tidak dibayar mempunyai hak untuk memfailkan petisyen untuk penggulungan, atas apa motif sekalipun. Ujian untuk ketaksolvenan perdagangan adalah senang, iaitu sama ada syarikat itu tidak berupaya untuk membayar hutang semasanya apabila perlu dibayar. Sesebuah syarikat mungkin mempunyai harta yang banyak yang tidak boleh direalisasikan dengan segera dan jika itu terjadi syarikat itu dikatakan tidak berupaya untuk membayar hutang-hutangnya dalam lingkungan s 218(1)(e) Akta tersebut dan ini adalah benar walaupun atas penyelesaian syarikat itu boleh membayar semua liabilitinya (lihat ms 814E–G).

(2) Luar aturan dalam notis statutori tidak menyebabkan apa-apa ketidakadilan yang besar terhadap penentang. Isu sebenar adalah sama ada penentang berupaya untuk membayar hutang-hutangnya. Selanjutnya, menggunakan k 194(1) Peraturan-Peraturan (Penggulungan) Syarikat 1972 kepada fakta matriks kes ini bermakna bahawa luar aturan dalam notis statutori berkaitan dengan alamat berdaftar penentang, walaupun ia bukannya kesalahan pempetisyen, boleh dipulih dan diremedikan oleh mahkamah. Tiada material untuk menunjukkan bahawa

penentang boleh membayar hutang-hutangnya dan atas alasan ini penentang patut digulung (lihat ms 817E, F dan 819B–C); *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* [1990] 2 MLJ 46 diikut]. A

Notes B

For cases on disputed debt, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 651–653.

For cases on notice of demand, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 786–787.

C

Cases referred to

Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd [1990] 1 MLJ 21 (refd)

IOC Australia Pty Ltd v Mobil Oil Australia Ltd (1975) 49 ALJR 176 (refd) D

Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd [1990] 2 MLJ 46 (folld)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (refd)

Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53 (refd) E

MBf Finance Bhd v Sri Hartamas Development Sdn Bhd [1992] 1 CLJ 160 (refd)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 (refd)

PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd [1995] 1 MLJ 21 (refd) F

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313 (refd)

Sunshine Securities (Pte) Ltd, Re; Sunshine Securities (Pte) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57 (refd) G

Tweeds Garages Ltd, Re [1962] 1 Ch D 406 (refd)

Wei Giap Construction Co (Pte) Ltd v Intraco Ltd [1979] 2 MLJ 4 (refd)

Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd [1994] 2 MLJ 266 (refd) H

Yap Kim Kee & Sons Sdn Bhd, Re [1990] 2 MLJ 108 (refd)

YPJE Consultancy Service Sdn Bhd v Heller Factory (M) Sdn Bhd (Formerly known as Matang Factoring Sdn Bhd) [1996] 2 MLJ 482 (refd)

I

Legislation referred to

Companies Act 1965 s 218(1)(e), (2)

Companies (Winding-Up) Rules 1972 r 194(1)

Song Lian Gek (*Zaid Ibrahim & Co*) for the petitioner.
Mathews George (*R Muthu & Co*) for the respondent.

Abdul Malik Ishak J: The respondent, Celini Corp Sdn Bhd, was incorporated on 9 December 1992 under the Companies Act 1965, with its registered office at Room 204, 2nd floor, Chevron Complex 1–3, Jalan Sisir 1, Taman Seraya, Kulai Besar, 81000 Kulai, Johor. The nominal capital of the respondent was said to be 100,000 shares divided into RM1 each and its paid up capital was said to be RM100,000. The objects of the respondent were, inter alia, to deal, distribute and transact wire mesh, tiles, bricks and other building materials. The respondent was indebted to the petitioner, Pioneer Concrete (M) Sdn Bhd, to the tune of RM462,819.50 being the balance of the purchase price of goods sold and delivered together with interest at the rate of 1% per month. The respondent failed, neglected and/or wilfully refused to pay to the petitioner the sum of RM462,819.50 notwithstanding numerous demands by the petitioner. A notice of demand dated 8 July 1997 pursuant to s 218 of the Companies Act 1965 was duly served on the respondent by leaving a copy of the same at the registered address of the respondent as mentioned aforesaid on 10 July 1997. The petitioner believed that the respondent was insolvent under the provisions of s 218 of the Companies Act 1965 and that the respondent was unable to pay its debt. It was said that it was just and equitable that the respondent be wound up. The petitioner prayed for the following prayers in encl 2 para 8:

(a) that the respondent may be wound up by the court under the provisions of the Companies Act 1965;

(b) that a liquidator be appointed;

(c) that the petitioner be allowed costs of and incidental to the winding up which would be taxed by the proper officer of the court and paid out of the assets of the respondent; and

(d) such other order as may be made in the premises as shall be just.

Miss Song Lian Gek, learned counsel for the petitioner, rightly pointed out that there were two potent issues raised by the respondent in the affidavit of reply affirmed by Chin Kwai Sun on 3 November 1997 as reflected in encl 5. I will now deal with these two issues, not in its order of merit.

The debt of RM462,819.50 was in dispute

The respondent disputed the debt and alleged that the petitioner did not take into account those sums which had been paid, particularly the sum of RM152,349 as reflected in exh C1 of encl 5. It is interesting to note that exh C1 of encl 5 showed that the sum of RM152,349 was payment made for November 1996 whereas the petition in encl 2 which itemised the debt to be RM462,819.50 was for the period from 2 December 1996 till 3 March 1997 — see annexure A thereof. This would clearly put the argument of Mr Mathews George for the respondent to an end. In fact, the petitioner to make doubly certain exhibited the same exhibit in encl 8

marked as 'LKH 1' which showed that the debt due was RM462,819.50 and not something else. A passage from the judgment of Plowman J. In *Re Tweeds Garages Ltd* [1962] 1 Ch D 406 merits reproduction. That passage would nip in the bud the problem as raised by Mr Mathews George and that passage reads as follows (see pp 413–414 of Plowman J's decision):

> From those sections it appears that the only qualification which is required of the petitioners in this case is that they are creditors and about that, as I have said, there is really no dispute. Moreover, it seems to me that it would, in many cases, be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine bona fide dispute whether the sum paid off is £10 or £20. The creditor then presents a petition to have the company wound up. Is the company to be entitled to say: 'It is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?' I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition.

In my judgment, the debt incurred by the respondent to the tune of RM462,819.50 was not in dispute at all. Inability to pay debts under s 218(1)(e) of the Companies Act 1965 is a common ground for a winding-up order. It is a correct statement of the law to say and I so say that prima facie, the petitioner as a creditor who is not paid has a right to file a petition for winding-up, whatever the motives may be. The court is not concerned about the motives of the petitioner here in winding-up the respondent (*Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95). It is germane to mention that the test of commercial insolvency is simple. It is this. Whether the company is unable to meet its current debts as they fall due? A company may have substantial wealth which cannot be realized immediately and if that happens the company is said to be unable to pay its debts within the purview and ambit of s 218(1)(e) of the Companies Act 1965 and this is so even though on liquidation the company will be able to meet all its liabilities: *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57; *Wei Giap Construction Co (Pte) Ltd v Intraco Ltd* [1979] 2 MLJ 4; *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53; *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21; *MBf Finance Bhd v Sri Hartamas Development Sdn Bhd* [1992] 1 CLJ 160 at p 169; *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd* & Ors [1988] 2 MLJ 449 at p 454 and *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21 at p 29.

Generally, inability to pay is proved by service of the statutory notice under s 218 (2) of the Companies Act 1965 or for that matter by other proof of insolvency. This brings me to the next issue raised by the respondent.

The statutory notice under s 218 (2)(a) of the Companies Act 1965 was defective

The statutory notice was exhibited as annexure B of the petition in encl 2 and it was worded thus:

NOTICE

Pursuant to s 218 of the Companies Act 1965

To M/s Celini Corp Sdn Bhd,
Room 204, 2nd Floor,
Chevron Complex 1–3,
Jln Sisir 1, Tmn Seraya,
Kulai Besar,
81000 Kulai,
Johor.

RE: Outstanding sum of RM462,819.50 and interest thereon outstanding amount for goods sold and delivered

TAKE NOTICE that you are now required to pay to us as solicitors for Messrs Pioneer Concrete (M) Sdn Bhd of Level 2, Block D, Kompleks Pejabat Damansara, Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur the sum of Ringgit Malaysia Four Hundred Sixty Two Thousand and Eight Hundred Nineteen and cents Fifty only (RM462,819.50) within twenty-one (21) days from the date of the service of this notice, failing which you shall be deemed to be unable to pay outstanding judgment sum under s 218(1)(e) of the Companies Act 1965 and appropriate action will be taken for the winding-up.

Dated 8 July 1997.

Sgd (Illegible)

.....
Messrs Zaid Ibrahim & Co,
Advocates & Solicitors,
Unit 11.02, Level 11,
Wisma LKN,
Jalan Wong Ah Fook,
Tel: 07–2248145

As can be seen, the statutory notice was forwarded to the respondent's address at:

Room 204, 2nd Floor,
Chevron Complex, 1–3,
Jalan Sisir 1, Taman Seraya,
Kulai Besar,
81000 Kulai,
Johor.

and this address was said to be the registered address of the respondent based on the search conducted with the Registrar of Companies in Johor Bahru. The affidavit in reply of the petitioner as affirmed by Lee Kiat

Hean on 14 November 1997 in encl 8 of para 8 and exh 'LKH 3' annexed thereto bore out this fact. Exhibit 'LKH 3' of encl 8 bore these intimate details:

AIM Management & Services Sdn Bhd
Company Search Form

Name of Company	:	Celini Corp Sdn Bhd
Change of name to	:	Nil
ROC Tempatan No	:	253776-W
Date of Incorporation	:	9 December 1992
Date of Latest Annual Return	:	30 June 1996
Registered office	:	Room 204, 2nd Floor, Chevron Complex, 1-3, Jln Sisir 1, Tmn Seraya, Kulai Besar, 81000 Kulai, Johor.
Factory Office	:	145, Jln Seroja 39, Tmn Johor Jaya, 81100 Johor Bahru.
AR lodged/ and filed	:	Rapid Mgmt Consultancy, Room 204, 2nd Floor, Chevron Complex, 1-3, Jln Sisir 1, Tmn Seraya, Kulai Besar 81000 Kulai, Johor.
Tel No	:	07-6622335
Authorized Capital	:	RM1,000
Paid-up Capital	:	RM100

Pesuruhjaya Sumpah

Sgd (Illegible)
No W 207
S Sundareson, AMN
122A, Jalan Burhanuddin Helmi,
Taman Tun Dr Ismail,
60000 Kuala Lumpur.

Another significant fact to highlight would be this. Thai Jiin Peir affirmed an affidavit of service in regard to s 218 notice on 4 November 1997 as

seen in encl 10 and at para 3 thereof it was deposed that on 10 July 1997, a s 218 notice was served on the registered office of the respondent at the aforesaid address by delivering and leaving a copy of that notice at the aforesaid address. Mr Mathews George drew my attention to the affidavit in reply of Chin Kwai Sun affirmed on 3 November 1997 as reflected in encl 5 particularly to para 7 where it was deposed that Rapid Management Consultancy filed on 21 January 1997 a change of the respondent's registered office from the aforesaid address to No 8–2, Jalan Harimau, Taman Century, 80250 Johor Bahru, Johor and this change of address prevented the respondent from receiving the statutory notice. Abdul Malek Ahmad J (now JCA) in *Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd* [1994] 2 MLJ 266 at p 267 was concerned that there must be adequate proof of physical delivery of the demand to the company especially when the letter of demand had been sent by registered post to the registered office of the company. Zakaria Yatim J (now FCJ) in *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 at p 111 was of the view that the demand must be in writing and signed by the creditor or his authorized agent and it must also specify the sum due. His Lordship Zakaria Yatim J (now FCJ) was also of the view that the demand must be served at the registered office of the company. On the other end of the scale, we have magnanimous judges like Abu Mansor J (now JCA) who in *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* [1990] 2 MLJ 46 held that minor irregularities in the statutory demand could be waived and that the real issue of the day was whether the company was able to pay its debts, and the evidence before his Lordship was that the company was indeed insolvent. The court in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 held that a mistake in the statutory demand regarding the time available for the debtor to pay was not fatal and it did not vitiate the demand. I adopt the liberal approach of Abu Mansor J (now JCA) in *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* and held that the irregularity in the statutory notice did not cause any substantial injustice to the respondent and this conclusion gained support by an affidavit in encl 8 para 12 which deposed that the accounts clerk with the respondent had spoken over the telephone with Lee Kiat Hean and it was intimated that the respondent was making an attempt to pay the debt of RM462,819.50 by instalments. On four previous occasions when the case came up for hearing, Miss Song Lian Gek informed the court that the parties were negotiating a settlement. The respondent would not be interested to negotiate a settlement unless they knew that they were indeed indebted to the petitioner. If the respondent knew about the debt, they must by inference received the statutory notice and I cannot help but feel constrained to say that they knew about the debt and was buying time. The real issue of the day would be whether the respondent was able to pay its debts. There is authority for the proposition that having proved a debt, like the petitioner here, the court is bound to give an order of winding-up (*Wei Giap Construction Co (Pte) Ltd v Intraco Ltd* [1979] 2 MLJ 4; and *IOC Australia Pty Ltd v Mobil Oil Australia Ltd* (1975) 49 ALJR 176) and applying these authorities, I am constrained to wind up the respondent. Ahmad Fairuz JCA in *YPJE Consultancy Service Sdn Bhd v Heller Factory*

(M) Sdn Bhd (Formerly known as Matang Factoring Sdn Bhd) [1996] 2 MLJ 482 focussed his mind to the critical issue of whether or not the company was able to pay its debts. This was what his Lordship said at p 490 of the report:

> ... Concerning the matter of the amount being incorrect or unclear, the learned Chief Justice referred to the case of *Dikwa Holdings Pty Ltd v Oakbury Pty Ltd* (1992) 8 ACSR 53 (which involved a notice that stated a quantum in excess of the debt owed) and referred to what Wilcox J said — that is:
>
> > ... even if the notice over-stated the amount owing, it is legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts.
>
> This, according to the Chief Justice: 'must be the correct approach'. After reviewing the evidence in the case, the learned Chief Justice resolved that the company was unable to pay its debts and that on the balance of probabilities the debt involved exceeded $1,000. I am in full agreement with the rationale that has been expounded in the cases which had been referred to above. And in this appeal, the notice of demand showed that the total principal amount owing far exceeded the quantum of RM500. Applying the reasoning in the cases from Australia, *Oriental Bank Bhd* and *Re Tweeds Garages Ltd*, I am of the view that the points raised could not be sustained.

At p 492 of the report, his Lordship continued:

> What is obvious from the two issues raised by the learned counsel for the appellant is that the issue are on matters of technicalities. On this, the learned Kaikaus J said (in *Imtiaz Ahmad v Ghulam Ali* PLD 1963 SC 382 at p 400):
>
> > The English system of administration of justice on which our own is based, may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights and is defective to that extent. The ideal must always be a system that gives to every person what is his.
>
> Admittedly, what had been uttered by the learned Kaikaus J, pertains to or is in the context of civil procedure. But what is important is the principle on technicality in the system of justice. In this appeal, what has not been quantified is the interest on the principal amount. The question that arises is whether the petition should be dismissed merely on that ground, when it is clear that the principal amount stated in the notice has not been disputed and the quantum stated in the notice was a quantum which was far more than RM500. A similar issue arises concerning the verifying affidavit which contained the same date as that in the petition. Is it just that the petition be dismissed only for the reason that the date was one which was not dated after a date stated in the petition when it was clear from the affidavit that the affidavit refers to that petition itself. The substantive matter in this appeal is the capability of the appellant in paying its debts, and there was no evidence that had been forwarded that could show the capability of the respondent company in paying off its debts. Because of that, I am respectfully of the view that this appeal should be dismissed with costs and the deposit to be given the respondent to account of taxed costs.

Rule 194(1) of the Companies (Winding-Up) Rules 1972 states:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the unjustice cannot be remedied by any order of the Court.

And applying it vigorously to the factual matrix of the present case would mean that the irregularity in the statutory notice in regard to the registered address of the respondent, though it was not the fault of the petitioner, was curable and could be remedied by this court. There was no material to show that the respondent could pay its debts and for this simple reason the respondent should be wound up.

For the reasons adumbrated above, I allowed encl 2, para 8(a), para 8(b) (with the official receiver as the provisional liquidator) and para 8(c).

Application allowed.

Reported by Loo Lai Mee